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THE CHARTER OF RIGHTS AND FREEDOMS: LEGAL RIGHTS

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ISSUE DEFINITION

The *Canadian Charter of Rights and Freedoms* came into force on April 17, 1982. The purpose of this analysis is to determine the effect that certain sections of the Charter dealing with "legal rights" have had on existing criminal law since then.

The relevant sections of the Charter are 7 to 14 inclusive. They deal with such matters as the right to life, liberty and security; the right to be secure against unreasonable search and seizure; the rights of an accused upon arrest; the right of an accused to certain proceedings in criminal and penal matters; and the right not to be subject to cruel and unusual punishment.

As there are now a great number of decided cases dealing with these sections, this Review will concentrate on significant decisions of the provincial Courts of Appeal and the Supreme Court of Canada.

BACKGROUND AND ANALYSIS

A. The Interpretation of an Entrenched Charter

When analyzing the decisions of the courts regarding these sections, it is important to remember that the Charter is entrenched within the Constitution of Canada and that, by virtue of s. 52(1) of the *Constitution Act, 1982,* "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

It could be argued that two sections of the Canadian Charter illustrate a conscious attempt by its framers to restrain the Canadian courts from achieving the level of judicial activism which has been prevalent in the United States and continue in some measure the Canadian heritage of parliamentary supremacy. Section 1 allows legislatures to impose reasonable limits upon rights and freedoms, while s. 33 allows the legislatures to expressly declare that a statute may operate notwithstanding certain sections of the Charter.

In its decision in the *Southam* case the Court indicated that "the task of expounding a constitution is crucially different from that of construing a statute". When considering the application of the Charter, it is important to recognize that it is a purposive document; that is, "its purpose is to guarantee and to protect within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action".

It is against this background of the contrast in concepts between the Charter and the American Bill of Rights that this review examines the legal rights protected by the Charter. Each section provides a short commentary on the possible problems and issues which will confront those who attempt to interpret and apply the section; then recent court decisions are set forth showing the impact of the section on the criminal justice system.

B. Fundamental Justice: Section 7

Section 7 states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This section presents two major problems to courts challenged with the task of giving full meaning to the Charter. First, one must deal with what is included in "life, liberty and security of the

person" and, secondly, a meaning must be attributed to the phrase "principles of fundamental justice."

As to "life", laws which affect the beginning of life or the end of life have been challenged. As to "liberty", any law imposing a penalty of imprisonment, could be affected, as could, within a prison, disciplinary or security measures imposing extra confinement, or parole or release procedures. As to "security of the person", laws which make provision for medical, surgical or psychiatric treatment, scientific experimentation with human beings, or sterilization could be challenged.

The Supreme Court of Canada has delivered judgment in a number of important and influential decisions which have given meaning and shape to the phrase "principles of fundamental justice." In *Re B.C. Motor Vehicle Act,* the Court said that the phrase is not a protected right but a qualifier to the protected right not to be deprived of "life, liberty and security of the person"; that is to say, its function is to set the parameters of that right. The Court refused to embark upon an exhaustive analysis of the content of the phrase, ruling instead that the "principles of fundamental justice are to be found in the basic tenets and principles not only of our judicial process but also of the other components of our legal system." In subsequent decisions, the Court would hold that in attempting to determine what these basic tenets are, one must "consider [the impugned measure] against the applicable principles and policies that have animated legislative and judicial practice in the field." These practices, in turn, said the Court "have sought to achieve ... a just accommodation between the interests of the individual and those of the state, both of which factors play a part in assessing whether a particular law violates the principles of fundamental justice." It is this balancing which the court attempts in every Charter case.

In the *Thomson Newspapers Ltd.* case, the Supreme Court was of the view that s. 8 of the Charter (i.e. the right to be secure against unreasonable search or seizure) and s. 14 (i.e. the right to an interpreter during court or tribunal proceedings) represent attempts to "address specific deprivations of the 'right' to life, liberty and security of the person in breach of the principles of fundamental justice, and as such,

violations of s. 7." These sections, and others, provide a guide or "invaluable key" to the meaning of the phrase "principles of fundamental justice."

The *Thomson* case makes the same reference as earlier cases to specific provisions of the Charter as guides to meaning. It held that s. 11(c) (i.e., the right of any person charged with an offence not to be compelled to be a witness in proceedings against himself or herself in respect of that offence) and s. 13 (i.e., the right against self-incrimination or what is known as "the right to silence") throw "light on the meaning of" this phrase. Therefore, the Court held that s. 7 can be used to "protect the individual from fundamental unfairness arising out of self-incriminatory statements in circumstances not covered by ss. 11(c) and s. 13." Having said that, however, the Court did caution that the principles of fundamental justice "vary with the context" and that the rights guaranteed by ss. 11(c) and 13, even with s. 7 factored-in, are not absolute; accordingly, although s. 7 guarantees a person the right to a fair hearing, "it does not entitle him to the most favourable procedures that could possibly be imagined."

This was not an unprecedented position for the Court and it did not reflect a willingness to dilute Charter protections. Rather, the Court was saying in essence what it had said in 1988 in the *Beare* case, where it held that, like "other provisions of the Charter, s. 7 must be construed in light of the interests it was meant to protect. It should be given a generous interpretation, but it is important not to overshoot the actual purpose of the right in question."

The right to silence is a basic tenet of the Canadian legal system and, as such, falls within the ambit of s. 7. An accused person has the right to remain silent during an investigation and at a trial. In *R. v. Hébert,* the Supreme Court held that an accused's right to silence had been infringed where the accused, while being detained, had made incriminating statements to a police officer posing as an arrested suspect. The accused, after consulting counsel, had indicated that he did not wish to make a statement. The Court held that the accused's right to

silence prior to trial arises by analogy with other legal rules against self-incrimination and is also related to a concern with maintaining the repute and integrity of the judicial process. The detained accused has the fundamental right to choose whether to speak to the authorities or remain silent. Under s. 7, the state is not entitled to use its superior power to override the suspect's will and negate his choice. In this case, the police had violated the accused's choice to remain silent by using a trick to negate his decision.

The right to silence was reaffirmed in the *Chambers* case where Mr. Justice Cory ordered a new trial largely on the basis of the infringement of this right. He said that it had been quite improper and highly prejudicial for Crown Counsel to cross-examine the accused about his silence in response to a police request for an explanation of his activities during their investigation of a drug case. The Court followed a line of authorities affirming that there is a right to silence which can properly be exercised by an accused person in the investigative stages of proceedings.

Section 7 is often used as a back-up clause by Charter litigants since successive Supreme Court of Canada and lower court decisions have interpreted it as supplementary protection, affording enhancement to specific rights such as those protected by s. 8 and s. 11(c). As such, Charter litigants plead it as an alternative to other sections of the Charter. The Supreme Court of Canada has consistently taken the position (and did so as recently as the 1990 *Thomson Newspapers Ltd.* case) that "fairness of the judicial process is what, in the end, fundamental justice is all about."

1. Scope of Application

In the Federal Court of Appeal decision in the *Operation Dismantle* case there was an attempt to narrow the scope of this section. Some judges stated that this section did not confer any independent absolute right to life or security of the person, while Mr. Justice Pratte stated that this section should not be interpreted in a manner which would allow the courts to substitute their opinions for those of Parliament and

the Executive on purely political questions. However, on appeal, the Supreme Court of Canada, while dismissing the appeal brought by Operation Dismantle, determined that the courts can review federal cabinet decisions to ensure that the Canadian government honours a general duty to act in accordance with the dictates of the Charter. The dilemma which this decision may have raised is that the Court must decide when it must refrain from substituting its own judgment on a particular issue for that of the executive, while at the same time it must attempt to determine whether government policy violates the Charter.

Despite this dilemma, it is clear that in appropriate circumstances the Supreme Court of Canada is prepared to use s. 7 of the Charter to facilitate the right of the individual to challenge executive and governmental decision-making. In the *Nelles* case, the Court held that a citizen who had been injured by actions of a Crown prosecutor which were "maliciously in fraud of his or her duties" could pursue a civil claim for damages or seek a Charter remedy. This decision has done away with the centuries-old tradition of absolute immunity for Attorneys General and their agents. The Court held that a malicious prosecution would be one depriving an individual of the right to liberty and security of the person in contravention of the principles of fundamental justice.

2. General Application of Section to Criminal Law

Shortly after the Charter was adopted, courts indicated that they were not generally willing to apply this section broadly in order to change the existing tenets of criminal law. For example, in the *Balderstone* case this section was held not to affect the section of the *Criminal Code* which authorizes the Attorney-General to indict an accused despite his discharge on a preliminary inquiry.

Statutes which impose minimum sentences have been held not to offend this section. In the *Gustavson* case, it was decided that the dangerous offender sections of the *Criminal Code* did not violate s. 7 of the Charter; in later cases, however, s. 7 was used to review the incarceration of dangerous offenders.

One of the most important effects of the application of s. 7 to the criminal law has been the courts' review of the mental element *(mens rea)* required in some crimes. This began with the decision in *Re B.C. Motor Vehicle Act.* In this case, the Supreme Court rejected the argument that ss. 7 and 8 to 14 were only procedural guarantees; some of these sections go further. In fact, the Court applied s. 7 to evaluate the substance of the legislation in question. This meant that the courts now had the obligation to ensure that the definition of a crime as prescribed by Parliament must not be inconsistent with the principles of fundamental justice, where the sanction for the crime was a deprivation of life, liberty or security of the person.

In *Re B.C. Motor Vehicle Act,* the Court considered an absolute liability offence, which makes the commission of an act an offence, even though the perpetrator is unaware of having committed the act. This case involved a provincial statute making it an offence to drive with a suspended licence although the person charged was unaware of the suspension; the statute carried a possible sanction of imprisonment. The Supreme Court held that absolute liability was contrary to the principles of fundamental justice and that this, in combination with possible imprisonment, violated s. 7 of the Charter. An accused facing imprisonment must have, at a minimum, some degree of moral culpability, the minimum being negligence coupled with a presumption of liability. This would give the accused the defence of due diligence.

In *R.* v. *Vaillancourt,* the Supreme Court struck down s. 213(d) (now s. 230(d)) of the *Criminal Code,* which defines murder as the commission of one of an enumerated series of offences with a weapon, resulting in death. The definition of the offence permits an accused person to be convicted even though he had no intention of using the weapon to kill; for example, where a gun discharged accidentally and someone was killed. A majority of the Court was of the opinion that because, in our society, murder carries a particularly high degree of moral blameworthiness, which justifies the particular stigma and sentence attached to a murder conviction, s. 7 requires a mental element reflecting the particular nature of that crime. That element obtains where a person means to cause

death or to cause bodily harm likely to cause death and is reckless of whether death ensues or not. The Court held, however, that it was not necessary to take this position. Section 7 requires that, at a minimum, the offence must envisage the objective foreseeability of death; that is, a reasonable person, in committing the elements of the offence, would have foreseen that the death of the victim was likely. Since the section in question (213(d) of the Code) permitted a conviction for murder even where a reasonable person would not have foreseen such a probability, the section was declared to be of no force or effect.

Lamer J., speaking for three other judges, also suggested that the principles of fundamental justice might require proof of a subjective *mens rea* or a guilty mind with respect to any criminally prohibited act, in order to avoid punishing the morally innocent. This would potentially render unconstitutional any offence permitting a conviction for mere negligence, of which there are many in the *Criminal Code*.

In *R.* v. *Martineau,* the Supreme Court declared unconstitutional a similar murder offence to that struck down in *Vaillancourt.* The provision of the *Criminal Code* in issue was s. 213(a) (now 230(a)), which provides for a conviction of murder where death ensues after a person commits bodily harm to another while committing an offence or during flight after the offence. In this case, the Court confirmed as a matter of law its opinion in *Vaillancourt* that a conviction for murder requires proof beyond a reasonable doubt of subjective foresight of death.

In *R.* v. *Swain,* the Supreme Court of Canada considered whether the common law rule that permits the Crown to raise the issue of the accused's insanity at trial, over the accused's objection, was constitutional in light of section 7.

The primary issue concerned a conflict between two of the principles of fundamental justice upon the application of the common law rule. Permitting the Crown to raise the issue of the accused's insanity, which is a defence to a criminal charge, conflicts with the principle that the accused alone is entitled to conduct his or her defence. This may prevent the accused from raising other defences with which the insanity

plea is inconsistent. It also tends to undermine the credibility of the accused, and may suggest to a jury that the accused is the type of person who would commit the offence.

On the other hand, permitting the Crown to raise the defence of insanity where the accused elects not to do so may be necessary to uphold society's interest in maintaining the fundamental principle that sanity is an essential element of criminal responsibility. Otherwise, a person could be convicted although he or she is incapable of having criminal intent.

A majority held that, because the purpose of the Charter is primarily to uphold the rights of the individual against the state, the accused's right to conduct his or her defence takes precedence over society's interest in upholding the principle that sanity is an essential element to criminal responsibility. Thus, where accused persons decide not to avail themselves of the insanity defence, this decision must be respected by the Crown.

However, the accused's right to conduct his or her defence is not absolute. The Court then formulated a new common law rule in light of the Charter, which defines the circumstances under which the Crown may raise the issue of insanity where the accused has decided not to do so. Where the accused attempts to show that he or she did not have the criminal intent required for the crime, the Crown can not at that point be precluded from raising the issue of insanity. Further, once the accused has been found guilty, and has not pleaded insanity, the Crown may then raise the issue. While the Court has formulated this new common law rule, the exact manner of its application in practice by trial courts remains to be seen. One possibility is that Parliament may be called on to enact a new procedure to take account of the Court's decision.

In *Swain,* the Supreme Court of Canada also considered the constitutionality of the provision in the *Criminal Code* that provides that a person found not guilty by reason of insanity is to be committed immediately into strict custody until the pleasure of the Lieutenant Governor is known. A majority held that this provision violated section 7 of the Charter because it denied such a person the procedural safeguard of

a hearing before being deprived of liberty, to determine whether he or she continued to be dangerous. The Court rejected the argument that the section constituted a reasonable limit under section 1. Because it prescribed committal for an indeterminate period, it did not meet the section 1 requirement that, in order to be valid, a law should impair the section 7 right to the minimum extent possible.

The majority also held that the provision violated section 9 of the Charter for similar reasons. The Court granted the legislature a six-month transitional period during which the provision would remain valid. During the transitional period, the remedy of *habeas corpus* will be available if a hearing is not held within a period of 30 to 60 days after the committal.

Partly in response to the *Swain* case, in September 1991 the federal government introduced in the House of Commons a bill to amend the mental disorder provisions of the *Criminal Code*. The amendments would include a provision to set up provincial review boards, which would assume the responsibility previously held by the Lieutenant Governor for case-by-case decisions on the care and detention of persons with mental disorders who have committed crimes. Another provision would require the review board, where an accused had been found not criminally responsible on account of mental disorder, to make a disposition with respect to the care and detention of that person within 45 days of the verdict. Where the court had made an initial disposition or in exceptional circumstances as determined by the court, the delay for making a disposition would be extended to 90 days.

In the *Seaboyer* and *Gayme* cases, the Supreme Court of Canada considered whether section 276 of the *Criminal Code*, the "rape-shield" law, violated sections 7 and 11(d) of the Charter. Section 276 prohibited the use of evidence concerning the sexual activity of the complainant with any other person than the accused except in selected circumstances as set out in the Section. It was held to infringe section 7 because, by providing for a blanket exclusion of such evidence, except in accordance with the specific exceptions, it could potentially exclude evidence that might be essential to the presentation of legitimate defences. Thus, it could lead

a bill contrary to the principles of fundamental justice. It was also held to violate section 11(d) because, by denying the accused evidence necessary for a legitimate defence, he or she could be deprived of a fair trial.

The Court held that the unconstitutionality of this provision does not mean that the law reverts to its former state, which generally permitted evidence of the complainant's sexual conduct. Evidence of sexual conduct and reputation cannot today be regarded as relevant either to the issue of the complainant's credibility or that of consent. It will be admissible only in exceptional circumstances, where it is tendered for a legitimate purpose and logically supports a defence, and where its relevance is not outweighed by its prejudicial effect on the complainant's testimony. New legislation to replace the law that has been struck down is expected to be introduced in Parliament shortly.

In *R.* v. *W.K.L.*, the Supreme Court of Canada held that the right to a fair trial pursuant to sections 7 and 11(d) was not violated by a lengthy delay in laying a charge in a sexual abuse case. The Court took judicial notice of the fact that delays are commonly associated with the reporting of sexual abuse, holding that victims should not be required to report incidents before they are psychologically prepared for the consequences of doing so.

C. Search or Seizure: Section 8

Section 8 of the Charter states:

> Everyone has the right to be secure against unreasonable search and seizure.

A variety of court decisions has dealt with this section, deciding whether in various fact situations searches are or are not reasonable and the ancillary question of whether evidence obtained during the search can be adduced at trial.

1. Application

The courts have held that a corporation is included in the word "everyone" which delineates who should receive the protection of this section. It has also been noted that the word "seizure" is used in this section in association with the word "search" and therefore the protection afforded does not extend to the taking of real property by expropriation. In the *Thomson Newspapers Ltd.* case, the Supreme Court of Canada said that the "essence of a seizure ... is the taking of a thing from a person by a public authority without that person's consent." Only that which is inanimate is subject to "seizure" because, as the Court said in this case, "the word 'seizure' ... should be restricted to tangible things." Thus the "seizure" of a person's thoughts by ordering that person to testify does not amount to a "seizure" under s. 8.

The Supreme Court of Canada in its decision in the *Hunter v. Southam Inc.* case determined that this section of the Charter was applicable to the search and seizure sections of the *Combines Investigation Act.* In this case the court was dealing with the constitutional validity of these sections of this statute. Therefore, in directing its attention to this legislation, the court held these sections to be unconstitutional for two specific reasons. First, the person designated to authorize the search under the legislation was not capable of acting judicially because he was also charged with investigative and prosecutorial functions as a member of the Restrictive Trade Practices Commission. Second, the relevant sections of the *Combines Investigation Act* which deal with authorizing searches and seizures do not contain the minimum standard required by the Charter. The criteria are that there must be reasonable and probable grounds, established under oath, to believe that an offence has been committed and that there is evidence of this offence to be found at the place of the search.

The court concluded that the search and seizure sections of the *Combines Investigation Act* were inconsistent with the Charter and of no force or effect as they failed to specify an appropriate standard for the issue of search warrants as well as not designating an impartial arbiter to issue them.

Similarly in the *Kruger* case, the Minister of National Revenue had authorized under the *Income Tax Act*, the search of the accused's business premises, private residences and business premises of other named persons. This authorization was approved by a judge of the Superior Court of Quebec on the basis of an affidavit. Following the seizure the accused made an application to the Federal Court trial division for an order quashing the authorization. The authorization was struck down as unreasonable because it was a blanket order covering the violation of any provisions of the Act and was not limited to the particular violations allegedly committed. The judgment was upheld in the Federal Court of Appeal because the Act conferred such a wide power of search and seizure that it leaves the individual without any protection against unreasonable searches and seizures.

As the *Simmons* decision of the Supreme Court of Canada reveals the right of Canada as a sovereign state to control both who and what enters its boundaries and the lower reasonable expectation of privacy by those travelling through customs does not diminish the obligation on state authorities to adhere to the Charter, even if, as here, drugs are found and the grounds prompting the search are reasonable. Before any search is conducted, the inspectors must clearly explain the subject's rights under the Charter - especially the prior right to consult a lawyer - and the right to have the search request reviewed before complying with it, as provided in the *Customs Act*. In *Simmons*, the subject remained ignorant of her legal position because she was not properly informed of these rights, and the Supreme Court found that, because of this oversight, the search was unreasonable; even so, the evidence was not excluded since the customs officers had acted in good faith.

The Supreme Court of Canada had held in several cases decided before *Simmons* that the invalidity of a search power does not render evidence inadmissible if the officers conducting the search had in good faith believed that the statutory provisions governing it were constitutional. In the *Greffe* case, it was "the inference of extreme bad faith on the part of the police (arising) from their deliberate failure to

provide the accused with the proper reason for the arrest" which had resulted in the exclusion of the seized drug evidence.

In *Greffe*, the R.C.M.P. had alerted customs officers in Calgary that the accused was returning to Canada with an unknown quantity of heroin. A visual search of his person was conducted after no heroin had been found in his luggage. He was not advised of his right to consult a lawyer or of his right under the Customs Act to have the search request reviewed beforehand by a justice of the peace, police magistrate or senior Customs Officer.

When the search revealed no drugs, the suspect was arrested, informed of his right to counsel and advised that a doctor would perform a body search at a hospital. This was subsequently done and a condom containing heroin was removed from the accused's anal cavity.

The Supreme Court found that the police had not had reasonable and probable grounds to suspect the accused had drugs on his person when searched; because the informer's tip had not contained sufficient detail to assure the police that it was based on more than rumour or gossip. The informer did not disclose to police the source of his knowledge, and the police did not have any indication of the informer's reliability. Furthermore, there was confusion about what reasons the accused was given for his arrest. When combined with the lack of advice concerning the right to consult counsel, the "cumulative effect" of Charter violations was "very serious" and enough to warrant exclusion of the evidence.

2. Warrant Improperly Granted or Obtained

In the *Caron* case a search warrant was obtained only with respect to stolen traveller's cheques. When the search was carried out, no cheques were found but a prohibited weapon was seized which the police had had reason to believe was on the premises when they applied for the search warrant. The court held that the police should have disclosed that they were looking for a prohibited weapon when they requested the search warrant. "By withholding information from the justice of the peace, and by achieving the desired result on the pretext of being interested only in other unrelated items, the informant was removing the process from the

judicial arena." It was held that the warrant obtained did not provide legal authority to conduct the search for the weapon. Similarly in the *Imough* case when it was learned at trial that the police officers did not have proper grounds for obtaining the warrant, the court held that "the admissibility of the evidence would shock the conscience of the community and bring the administration of justice into disrepute having regard to the sanctity of a person's dwelling and that the search in this case was conducted entirely without legal authority."

These decisions should be contrasted with the decision of the Ontario Court of Appeal in the *Chapin* case where the court, while agreeing that the police had conducted an unreasonable search and infringed the accused's rights under s. 8 of the Charter, decided to admit into evidence the items found by the police. The court, in deciding this, took into account such matters as the nature and extent of the illegality, unreasonableness of the conduct involved, and the fact that the police had been acting in good faith. In the *Cameron* case, the court determined that in order to properly obtain a search warrant under s. 10 of the *Narcotic Control Act* the narcotics must be present in the premises at the time of the application for the warrant. However, the invalidity of the warrant does not by itself establish that the search made pursuant to the warrant is unreasonable.

Perhaps the best statement of law on the subject of warrants is contained in the *Rao* case. The court stated that, unlike the Fourth Amendment to the U.S. Constitution, this section of the Charter does not create a "warrant clause". Therefore the central issue in any case in which the validity of a search or seizure is challenged is whether the particular search or seizure meets the constitutional requirement of reasonableness unfettered by any constitutional requirement of a warrant.

3. Plain View Doctrine

In the *Shea* case, the Ontario High Court followed the "plain view" doctrine cases in the United States when it decided that once a police officer is lawfully in residential premises, he has the right to seize articles such as narcotics which are in plain view.

4. Search of the Person

A review of the cases where search of a person was conducted seems to indicate that the courts strictly scrutinize such searches and in many cases find them unreasonable and exclude any evidence obtained as a result of them. For example, in a British Columbia case the accused was sitting in a bar which apparently was frequented by heroin users and traffickers. The accused was seized by two police officers, one of whom employed a choke hold which rendered her semiconscious, while the other forced her mouth open. While this was happening, three caps of heroin dropped out of the accused's right hand. The court held that the officers in this case did not have reasonable and probable grounds to believe that narcotics were in the accused's mouth and that therefore the search was unlawful. The court went further and determined that to admit the evidence would bring the administration of justice into disrepute, for it would condone and allow the continuation of unacceptable conduct on the part of the police. This decision, rendered in the important *Collins* case, was affirmed on appeal by the Supreme Court of Canada.

In the *Heisler* case, a random search of people entering a rock concert disclosed a large quantity of drugs in the accused's possession. However, the evidence revealed that there had been no grounds upon which to base the search. The court determined that the accused had been subjected to an unreasonable search which went beyond the bounds of mere bad taste and impropriety. The evidence was excluded on the basis that otherwise the administration of justice would be brought into disrepute. However, in the *Roy* case the Ontario High Court held that where there are signs posted making submission to a search a condition precedent to entering a rock concert, a subsequent search is not in violation of this section.

In the *Debot* case, the police received a tip from an informant that the appellant was going to take delivery of a substantial quantity of the amphetamine, "speed." He was stopped, ordered from his car, told to assume a "spread eagle" position and to empty his pockets. Speed was found.

Although the search was carried out without a warrant, the Supreme Court of Canada held that the police had acted reasonably and that the evidence should not have been excluded as the trial judge had ordered. Chief Justice Dickson said that although a detainee has the right to be informed of the right to retain and instruct counsel immediately upon detention - a requirement the police had observed in this case - and although the "spread eagle" direction amounted to a detention, the police are not obligated to suspend a search as an incident to an arrest until the detainee has had the opportunity to retain counsel.

His Lordship went on to say that "denial of the right to counsel as guaranteed by section 10 of the Charter will result in a search's being unreasonable in only exceptional circumstances. A search is reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable. The denial of the right to counsel does not affect the 'manner' in which the search is conducted." The Court said that the manner in which the search is conducted relates to the physical way in which it is carried out." The Court went on to say that "evidence obtained by way of a search that is reasonable but contemporaneous with a violation of the right to counsel will not necessarily be admitted," and, indeed, "evidence will be excluded if there is a link between the infringement and the discovery of the evidence, and if the admission of the evidence would bring the administration of justice into disrepute."

This position has been repeated many times by the Supreme Court in what now amounts to a plethora of search and seizure cases heard since the Charter came into force and of which the majority have had to do with drug seizures. However, the *Langlois and Bedard* case marks the first time the Court comprehensively considered the question of the existence and scope of the power of the police to search a person who has been lawfully arrested.

In that case, the appellants were constables employed in Montreal. The respondent, Cloutier, a lawyer practising in that city, was stopped by the constables after he had committed a motor vehicle infraction. When it was discovered that a warrant of committal for unpaid

traffic fines had been issued for him, he was arrested and "frisk searched" before being placed in the patrol car. Cloutier subsequently charged the appellants with common assault, contrary to the Criminal Code.

The Supreme Court analyzed the scope of the recognized and long established common law power of the police to search a lawfully arrested person and to seize anything in his or her possession or immediate surroundings in order to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him.

Following the *Collins* and *Debot* decisions, the Court held that a search will not be wrongful if it is authorized by law, if the law is itself reasonable and if the search is conducted in a reasonable manner. Therefore, since a "frisk" search "is a relatively non-intrusive procedure (consisting of) outside clothing (being) patted down to determine whether there is anything on the person of the arrested individual," it "does not constitute in view of the objectives sought, a disproportionate interference with the freedom of persons lawfully arrested. There exists no less intrusive means of attaining these objectives."

The Court outlined three criteria to be met in order that a search not be characterized as unreasonable and unjustified: (1) that the police are under no duty to search but can exercise their discretion in each case, based on the particular facts; (2) that the search is "for a valid objective in pursuit of the ends of criminal justice," such as a search for weapons or evidence; and, (3) that the search "must not be conducted in an abusive fashion."

The Supreme Court applied these criteria in significant decisions rendered on 25 January 1990 in the *Duarte* and *Wiggins* cases; these will undoubtedly have a measurable impact on policing methods, particularly undercover investigations involving drug and morality offences. In the *Duarte* case, the Court said that unauthorized electronic surveillance (i.e., room "bugging" or the tape recording of telephone conversations) and interception "of private communications by an instrumentality of the state with the consent of the originator or intended recipient thereof, without prior judicial authorization, does infringe the rights and freedoms guaranteed by s. 8." Previously, it had been legal for

the police to intercept that communication, as long as one of the parties to the conversation consented. It will now be necessary for a judge to authorize the interception in the same way that the interception of an entirely private conversation (i.e. "wiretapping"), where neither of the parties gives prior consent, must first be authorized.

In *Duarte,* the Supreme Court said that "the primary value served by s. 8 is privacy," which it defined as "the right of the individual to determine when, how, and to what extent he or she will release personal information." Accordingly, "one can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance and to which, in consequence, the protection accorded by s. 8 should be more directly aimed." The Court took the position that it could no longer allow the police an "unfettered discretion ... to record and transmit our words" without prior judicial authorization because this widespread police practice represented an "insidious danger" to the "very hallmark of a free society," namely, the "freedom not to be compelled to share our confidences with others."

In *Wiggins,* the use of "body pack" microphones by police was also found to be unconstitutional for the reasons expressed in *Duarte.*

In the *Wong* case, the Supreme Court extended even further the protection of the individual from invasion of privacy by the state. The Court held that the accused, by inviting persons, through public notices in restaurants, to an illegal gambling operation, had not opened this operation to the public to the extent that it was no longer a private event. He had therefore not relinquished his protection under s. 8. The Court applied the criterion developed in *Duarte,* holding that, although the accused had distributed public notices, they did not connote "tacit consent" to electronic surveillance by the police. Therefore, the gambling operation was still "private." Thus the unauthorized surveillance by the police constituted an unreasonable search and seizure under s. 8.

In the *Kokesch* case, the police conducted a "perimeter search" of the property of the accused in order to find evidence of cultivation and possession of narcotics for the purpose of trafficking. The Supreme Court held that where there was a mere suspicion of the crime,

such conduct was an unreasonable search and seizure. The police do not have the power under the common law to trespass on private property to conduct a search.

At the same time, it also considered the procedure followed by the courts in allowing the accused access to confidential "sealed packets" containing legal documents on the basis of which judicial authorization for wiretapping is granted. In *R.* v. *Thompson,* the Court held that the police cannot indiscriminately bug any and all pay phones that the accused might use; this would violate the public's right to be free from unreasonable search and seizure. However, broadly-worded clauses in a judicial authorization which permit bugging of phones at any place to which a suspect might "resort" are valid, provided the police have reasonable and probable grounds for believing that the person actually "resorts to" that place.

In *Dersch* v. *Canada,* and *R.* v. *Garofoli,* the Supreme Court held that the accused need only make a request to examine the legal documents in the "sealed packet" for access to be granted. Such access is necessary to permit the accused to make a full answer and defence, and in particular, to evaluate whether the wiretapping was performed in conformity with s. 8.

5. Breath Tests and Blood Samples

The cases usually hold that compulsory breath tests do not constitute unreasonable search and seizure since these can only be demanded when there are reasonable and probable grounds to believe the motorist is impaired. The Ontario case of *R.* v. *Fraser* has determined that when these reasonable and probable grounds are missing, the taking of a breath sample amounts to unreasonable search and seizure.

The courts seem to be agreed that there is no unreasonable search and seizure involved where hospital personnel take a blood sample from an accused for use in treating him and where the sample is later turned over to the police pursuant to a search warrant.

In the *Dyment* case, however, the Supreme Court of Canada held that evidence concerning the results of a blood sample analysis should be excluded when a doctor, having taken a sample for purely medical

purposes, turns that sample over to an investigating police officer who has not noted signs of impairment and who has neither asked the respondent to provide a blood sample nor asked the doctor to do so.

The Court said that s. 8 is concerned not only with the protection of property but also with the protection of the individual's privacy against search or seizure. It considered the doctor's action in taking the blood and the police officer's receipt of it as a very serious Charter breach: "A violation of a persons's body is much more serious than a violation of his office or even his home," said the Court.

D. Arrest and Detention: Sections 9 and 10

These sections of the Charter state as follows:

> 9. Everyone has the right not to be arbitrarily detained or imprisoned.
>
> 10. Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefor;
>
> (b) to retain and instruct counsel without delay and to be informed of that right; and
>
> (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

Standards by which the arbitrariness in section 9 can be measured are fast being established with successive decisions of the Supreme Court of Canada. Thus, it is arbitrary and offensive for the police, with little or no reason, to detain or arrest a person for questioning or for further investigation; however, it is not improper for them to pursue their investigation following an arrest made on the basis of their reasonable and probable belief that the accused is committing or has committed an offence. In the *Storrey* case, the Court said that the police do not require anything more than reasonable and probable grounds for making the arrest. They do not have "to establish a prima facie case for conviction before making the arrest."

The courts, when applying s. 9, have tended not to overturn standard police practices. Thus, police demands that an accused submit to finger printing as required by law have been held not to be unreasonable or capricious. In the *Higgins* case, the Supreme Court of Canada held that taking the fingerprints of an accused while he is in custody or is directed by an appearance notice or summons to appear, does not violate any of ss. 7, 8, 9, 10, 11(c) or 11(d) of the Charter. The Court said that fingerprinting is not contrary to the principle of fundamental justice and that the procedure is a relatively minor intrusion compared to others permitted the police at common law. Finally, although the Court acknowledged that the Charter guarantees a reasonable expectation of privacy, it held that a person arrested or charged must expect a significant loss of personal privacy.

Also, it has been decided that the provisions of this section are not infringed when a motorist is stopped on a highway by a police officer for a vehicle check and where a demand is made to take a breath test when the police officer smells alcohol on the motorist's breath.

1. Random Stops of Motorists by the Police

In a series of three cases, the *Dedman* case in 1985, the *Hufsky* case in 1988, and the *Ladouceur* decision in May 1990, the Supreme Court of Canada has pronounced on the constitutionality of random stopping of motorists by police. In *Dedman,* Mr. Justice Ledain for the majority of the Court, held that the 1980 Ontario R.I.D.E. program, in which police deployed checkpoints to screen impaired drivers, did not impinge a Charter right - even though the police did not have the statutory authority to conduct a random stop. The reason was that driving is a "licensed activity that is subject to regulation and control for the protection of life and property."

In like fashion, Mr. Justic Ledain delivered the unanimous opinion of the Supreme Court in the *Hufsky* case, where the constitutionality of another Ontario police practice - spot check random stops - was reviewed. Unlike the R.I.D.E. program in *Dedman,* at issue in *Hufsky* was more than a search for impaired drivers. The random stops during these

spot checks had a broad range of purposes, including checking for insurance papers and for the mechanical fitness of cars. Mr. Justice Ledain said that the absence of police guidelines meant that the stops constituted arbitrary detention in violation of s. 9 of the Charter, since the decision to stop a vehicle was thus left absolutely to the discretion of the police. That being said, however, His Lordship was of the view that the Charter was not violated in this case because any rights infringe- ment was demonstrably justified in the interest of public safety. Again, for the Court, it was significant to note that driving could not be considered a fundamental right but was rather "a licensed activity subject to regulation and control."

In *Ladouceur,* at issue was the random stopping by Ottawa police of a vehicle for essentially no reason and not as part of either an organized or spot check program. The Supreme Court split 5-4 in holding that this was an arbitrary stop that, following the *Hufsky* decision, was in violation of s. 9 of the Charter. Despite this fact, the stopping was not ruled to be unconstitutional because it was a reasonable limit, demonstrably justified in a free and democratic society. Even the dissenting four justices agreed with the majority in the result although they felt that allowing such a practice went beyond what the police should be enabled to do and gave them an unlimited right to stop vehicles.

With reference to s. 10(a) the *Amos* case states that the Charter now enshrines what has always been the case in Canada, that the law does not recognize any right in the police to arrest or detain against his will any person who is not charged with an offence, merely for the purposes of investigating an offence which the police believe has already occurred.

2. Right to Retain Counsel

In the *Ironchild* case it was held that this section is not violated when the accused, questioned as to whether he wishes counsel, gives a somewhat ambiguous reply and expresses only a vague desire to consult a lawyer, it being proper for the police to repeat the question without doing anything further. However, in the majority of other cases, the courts have held that this right, when explained, must result in the accused being given a real opportunity to retain counsel. In the *Nelson*

case, it was stated "there should not be a mere incantation of a 'potted version' of the right followed by conduct on the part of the police which presumed a waiver of the right. ... The thrust of this provision is the guarantee of information so that an early opportunity to make a reasoned choice is available to the accused. The purpose of making the accused aware of his right is that he may decide, and that means he should have a fair opportunity to consider whether he wishes to resort to his right."

In *R.* v. *Evans,* the Supreme Court of Canada considered the extent to which the accused upon arrest must understand the police statement of his rights and when the police must reiterate those rights. When the accused, who had an I.Q. of between 60 and 80, was informed of his rights and asked whether he understood them, he said no. Nevertheless, the police, who were aware of his diminished mental capacity, took him to the station, and conducted interviews which eventually led to his confessions to two murders. The Court held that this was a violation of the accused's right to counsel, and held that the evidence of the confessions must be excluded under section 24(2).

In overturning the conviction and acquitting the accused, the Court categorically rejected the position of the Appeal Court that the administration of justice would fall into disrepute were a self-confessed killer to be freed merely because his right to counsel was violated. Due to the Charter violation, the reliability of the accused's confessions was suspect, and he had not had a fair trial. The position of the Appeal Court effectively presumed the accused's guilt.

As a result of this case, to ensure that suspects understand their rights, police may have to make extra efforts in particular cases involving children, people who do not speak the language used by the police, and those with diminished mental capacity.

A majority of the Court also held that the accused's right to counsel was violated when the police began to suspect him of murder in place of a lesser offence but did not inform him anew of his right to counsel.

The Ontario Court of Appeal, in overruling a lower court decision, has held that police officers do not have a duty to help an

accused obtain legal advice. It was felt that to hold to the contrary would set too high an obligation on the police.

The Supreme Court of Canada has also considered the issue of whether there is an obligation upon the police to assist an accused person to exercise the right to counsel. Whereas, in the *Manninen* case the Court expressly left this question open, in the *Baig* case the Court held that a police obligation to provide an opportunity to retain and instruct counsel only arises where the accused has initially expressed the desire to exercise the right. The corollary of this ruling is that the failure of the police to do anything to promote the exercise of a Charter right will not amount to a Charter violation if the accused does not invoke the right.

However, as a result of the February 1990 decision of the Court in the *Brydges* case, there is no doubt that the police are under a duty in all cases to facilitate contact with counsel. The accused, a native of Alberta who had been arrested in Manitoba for murder, was informed without delay of his right to retain and instruct counsel. He was again advised of this right at the police station. The accused asked the investigating officer if Legal Aid existed in Manitoba because he could not afford a lawyer. The officer replied that he thought such a system did exist in the province. When asked again if he wanted to speak with a lawyer, the accused said that he did not. After making a number of incriminating statements, however, he asked to speak with a Legal Aid lawyer. One was contacted and he advised the accused not to say anything further.

In upholding the trial court decision to exclude the statements because of a violation of the accused's rights under s. 10(b), the Supreme Court said that "(w)here an accused expresses a concern that the right to counsel depends upon the ability to afford a lawyer, it is incumbent on the police to inform him of the existence and availability of Legal Aid and duty counsel." Here, "the accused was left with the mistaken impression that his inability to afford a lawyer prevented him from exercising his right to counsel." Accordingly, the accused could not waive something he did not fully understand (i.e. his s. 10(b) rights).

As a consequence of *Brydges,* the police are now under two additional duties beyond informing the detainee of his s. 10(b) rights: they "must give the accused or detained person a reasonable opportunity to exercise the right to retain and instruct counsel, and ... the police must refrain from questioning or attempting to elicit evidence from the detainee until the detainee has had that reasonable opportunity." The detainee must still exercise "reasonable diligence" in exercising this right and can, either explicitly or implicitly, waive it; however, he must understand and be aware of the consequences of so doing and, any implicit waiver will be scrutinized very closely by the Court.

The Supreme Court said that henceforth the police must advise of the existence and availability of duty counsel and Legal Aid in all cases of arrest or detention - not only those where the detainee is or appears to be impecunious. This is so even if, following advice from the police about s. 10(b) rights, the detainee does not ask to speak with a lawyer. The accused must make a reasonably diligent effort to exercise the right after that advice is given. If the accused does not, then, as the Supreme Court of Canada said in the *Smith* case, the police are not required to refrain further from attempting to elicit evidence from the accused.

The *Brydges* case is an important decision because it places an additional duty on the police "as part of the information component of the s. 10(b) caution." Built into the decision was a transitional period of 30 days from the date of the judgment (i.e. 1 February 1990) to give the police time to adjust and print new Charter caution cards. Periods of transition had been inserted in prior Supreme Court decisions, notably *Reference Re Manitoba Language Rights.*

In the *Kelly* case, the Ontario Court of Appeal drew a distinction between the interests protected by paragraphs (a) and (b) of section 10. With respect to para. (a), the court held that a person is not obliged to submit to an arrest if he does not know the reason for it, and accordingly it is essential that he be informed properly or immediately of the reasons. On the other hand, the relevant interest affected by para. (b) is that of not prejudicing one's legal position by something said or done without, at least, the benefit of legal advice. The requirement

that the accused be informed "promptly" of the reason for the arrest means that he be informed "immediately". However, the requirement that the accused be informed of the right to counsel "without delay" is not the same as immediately. Thus, while there may be good reason why an arrested person's right to be informed of his right to counsel should be "without delay" there is no essential reason why it has to be a part and parcel of the statement under para. (a) as to the reason for the arrest, which is really part of the arresting process itself.

The Supreme Court of Canada in the *Manninen* case held that section 10(b) imposes at least two duties on the police in addition to the duty to inform the detainee of his rights. First, the police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay; this includes the duty to offer the respondent the use of the telephone. Although circumstances might exist where it is particularly urgent for the police to continue with their investigation before thus facilitating a detainee's communication with counsel, there was no such urgency in this case. Second, the police must refrain from questioning the detainee until he has had a reasonable opportunity to retain and instruct counsel. The purpose of granting right to counsel is not only to allow the detainee to be informed of his rights and obligations under the law but also, and equally if not more important, to obtain advice as to how to exercise those rights.

It was held in this case that the police officers correctly informed the respondent of his right to remain silent and the main function of counsel would have been to confirm the existence of that right and then to advise the detainee on how to exercise it. For the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence. This aspect of the respondent's right to counsel was clearly infringed, however, as police continued questioning when there was no urgency to justify it.

The respondent did not waive his right to counsel by answering the police officers' questions. A person may implicitly waive his rights under s. 10(b), but the standard is very high and was not met in this case.

In the *Therens* case, the Supreme Court of Canada considered the issue of breathalyzer testing and s. 10(b) rights. In the course of deciding whether a person arrested or detained for impaired driving need be informed of his right to retain and instruct counsel before deciding how to respond to a breathalyzer demand, the Court offered for the first time a comprehensive definition of the word "detention" as used in s. 10 of the Charter. The Court held that detention was the restraint of liberty, other than arrest, by the police or some other agent of the State; such restraint was not limited to physical compulsion or control. Detention would also result, said the Court, if the individual submitted or acquiesced in such deprivation of liberty (in this case as the result of a breathalyzer demand) because he or she felt "the choice to do otherwise does not exist."

The Court went on to hold that a charge of failing the breathalyzer test or refusing to provide a breath sample would not stand if the offending motorist was not informed of the right to retain and instruct counsel without delay. In a case where a person received an approved screening device ("A.L.E.R.T.") demand, however, the requirement that he or she provide such sample "forthwith" was incompatible with the wording in s. 10(b) of the Charter and, hence, was a "reasonable limit" on this right, as provided in s. 1 of the Charter. Similarly, the Court held that the police are under no obligation to comply with s. 10(b) of the Charter when the person is merely charged with impaired driving rather than failure of the breathalyzer test or refusal to provide a breathalyzer sample as distinct from an A.L.E.R.T. sample; in that circumstance there is no connection between the recovery of self-incriminating evidence and a Charter violation.

The causal connection between the breach of an individual's s. 10(b) rights and the recovery of evidence was recently considered by the Supreme Court of Canada in the *Black* case. This involved a charge of murder, during the investigation of which the weapon used, a knife, was recovered by the police after the appellant had given them a written statement. The Court held that there had been a breach of the appellant's rights under s. 10(b) in that the police had continued to question the appellant despite the fact she was drunk and despite her clear prior

request for the opportunity to consult counsel. For this reason, any evidence recovered thereby and thereafter should be excluded.

Many lower court decisions have followed *Therens* and many interesting developments in the law have resulted. One of these is the decision of the Appeal Division of the Nova Scotia Supreme Court in the *Baroni* case. This decision held that the results of physical coordination and sobriety tests conducted by police officers at the roadside were to be excluded where the individual tested had not been informed of the right to retain and instruct counsel as provided in s. 10(b) of the Charter. The *Brydges* case is the most important decision on the scope of s. 10(b) since *Therens*.

3. Habeas Corpus: Section 10(c)

Habeas corpus means literally "you have the body." It is a term for a variety of ancient writs which commanded a person detaining another to produce the prisoner before a court or judge.

In the *Gamble* case, the Supreme Court of Canada breathed new life into this procedure by ruling that habeas corpus was, in appropriate circumstances, available as a Charter remedy. In this case, the respondent had been incarcerated following his conviction for a first degree murder for which he had been tried pursuant to Criminal Code provisions which were not yet in force.

Taking what it termed "a purposive and expansive approach," the Court granted the remedy of habeas corpus. The Court held that an individual enjoyed "a residual liberty interest" found in s. 7 and it was clear in this case that the respondent had been deprived of his liberty in contravention of the principles of fundamental justice.

E. Specific Rights: Section 11

This section states:

> 11. Any person charged with an offence has the right
>
> (a) to be informed without unreasonable delay of the specific offence;
>
> (b) to be tried within a reasonable time;

> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
>
> (e) not to be denied reasonable bail without just cause;
>
> (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
>
> (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
>
> (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
>
> (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

1. Informed of Specific Offence - Section 11(a)

The courts have interpreted "the right to be informed without unreasonable delay of the specific offence" as arising when the information is laid; that is, when the person is "charged with the offence." It has also been held that this section does not offend the right to lay charges in the alternative.

An example of the operation of this subsection can be seen in the *Ryan* case wherein the court quashed an information which was laid two months after the accused received an appearance notice.

The courts have interpreted the phrase "informed ... of the specific offence" pragmatically, as implying the right to be informed of

the substantive offence and the acts or conduct which allegedly form the basis of the charge.

2. Tried Within a Reasonable Time - Section 11(b)

In the *Askov* decision of the Supreme Court of Canada, rendered on 18 October 1990, Mr. Justice Cory, for the unanimous Court, held that the right to be tried within a reasonable time, like other specific s. 11 guarantees, is primarily concerned with an aspect of fundamental justice guaranteed by s. 7. The primary aim of s. 11(b), he said, is to protect the individual's rights and to protect fundamental justice for the accused. There is a need to treat those on trial fairly and justly. There is also a practical benefit to be derived from resolving charges quickly since memories fade with time and witnesses may move, become ill or die. Victims of crime also have an interest in whether or not criminal trials take place within a reasonable time.

Mr. Justice Cory argued that the failure of the criminal justice system to work "fairly, efficiently and with reasonable dispatch ... inevitably leads to community frustration with the judicial system and eventually to a feeling of contempt for Court procedures."

His Lordship went on to say that in determining whether the delay in bringing the accused to trial is unreasonable, the court should consider a number of factors, such as: 1) the length of the delay; 2) the explanation for the delay; 3) the accused's waiver of the right to be tried expeditiously (i.e. through requests for, or agreement with, adjournments or failure to demand as early a date as possible for trial); and 4) prejudice to the accused. The longer the delay, the more difficult it should be for a court to excuse it and "very lengthy delays may be such that they cannot be justified for any reason." Those delays which will weigh in favour of the accused, he continued, are those attributable to the Crown or to systemic or institutional delays; in complex cases, delays longer than those in simple cases will, to a point, be acceptable.

His Lordship held that when considering delays occasioned by inadequate institutional resources - which was essentially the reason for the two year trial delay in *Askov* - the court may compare the jurisdiction in question [i.e. Ontario] with other, "better" jurisdictions in the rest

of the country. In all cases, the Crown will have the burden of showing that the institutional delay in question is justified. A waiver by the accused of his rights will justify delay, but to be valid such a waiver must be informed, unequivocal and freely given.

The *Askov* decision has generated considerable confusion in Canadian criminal courts. From the date of the *Askov* decision until 12 April 1991, in Ontario alone, more than 34,495 charges have been stayed, dismissed or withdrawn on the basis of the judgment. This appears to have had a serious impact on the public's confidence in the administration of justice. Justice Peter Cory, who wrote the judgment, was so "shocked" by its effects that he told a legal conference that the Court had not been made aware of the potential impact of the decision at the hearing. He indicated that the ruling may have been misinterpreted by lower courts and defence counsel.

In order to ensure that the decision was "properly understood and applied throughout Ontario," the Ontario Court of Appeal, in March 1991, selected six special cases to be heard by the Court. In *R. v. Bennett,* the lead case, the Court concluded that the large number of stayed cases stemmed from an erroneous interpretation of the decision that a systemic delay beyond six to eight months in bringing an accused to trial should automatically result in a stay or dismissal of charges. The Court held that the assessment of whether there has been an unreasonable delay should not be reduced to a simplistic computation of time. The Court must carefully balance the four factors noted above. Further, the case puts a heavy burden on defendants to submit "sophisticated" statistical information concerning systemic delay in particular jurisdictions in support of their motions for a stay. These decisions will undoubtedly have a significant impact in reducing the number of stayed and withdrawn charges on the basis of section 11(b).

3. Right Not to be a Compellable Witness Against Oneself - Section 11(c)

This subsection is widely worded and on this basis, Professor Martin Friedland argues that it may prevent the enactment of a

law compelling the accused to give evidence at a preliminary hearing and also compelling one to give evidence to a police officer.

An Ontario Court of Appeal decision in the *Crooks* case indicates that this paragraph does not prevent the Crown from calling as a witness on a preliminary inquiry an accused separately charged with the same offence.

It should also be noted that this subsection has been interpreted as not impinging upon the taking of breath samples. In the *Stasiuk* case, it was decided that "the privilege against self-incrimination is a limited one which applies to an accused *qua* witness and is restricted to a testimonial compulsion. A breath test is not in the nature of a statement or a testimonial utterance."

A recent Ontario case involved the seeking of a civil remedy while there were outstanding criminal charges connected with the same fact situation. It was decided that s. 11(c) of the Charter does not mean that a person who chooses to defend a civil action is not compellable in the civil proceeding if this arises from facts that are also the subject of simultaneous criminal proceedings. The court added that neither s. 11(c) nor s. 13 of the Charter give any hint of support for the proposition that the privilege against self-incrimination means that a party has the right to remain silent in parallel civil proceedings.

Moreover, this section does not exempt one from being called as a witness at either a coroner's inquest or before a Royal Commission of Inquiry.

4. Presumption of Innocence - Section 11(d)

This subsection is composed of several elements. The one that has been considered most in the case law is the presumption of innocence. The issue has been the constitutionality of statutes with a "reverse onus" clause requiring the accused to disprove an element of the offence or to prove an excuse or the existence of a fact that will avoid conviction. The Supreme Court of Canada has considered this issue in several cases (beginning with *R.* v. *Oakes* and, more recently, in *R.* v. *Whyte*, *R.* v. *Keegstra* and *R.* v. *Chaulk*), in which it was held that such clauses violate s. 11(d). Where an onus is put on the accused to prove

something in order to escape conviction, the general presumption of innocence in the criminal law is effectively displaced by a presumption of guilt. The Supreme Court, in *Whyte* and *Keegstra,* ruled that such clauses are unconstitutional because they raise the possibility of the accused's being convicted in spite of the existence of a reasonable doubt; that is, the accused might fail to prove the existence of the exonerating element, though it might, in fact, exist.

While the statutes in question may abridge the s. 11(d) right, they may still be upheld as a reasonable limitation of that right pursuant to s. 1, where the legislature or Parliament has a legitimate objective for the limitation.

In *Keegstra,* the Court recently considered the hate propaganda provisions of the *Criminal Code.* A majority held that s. 11(d) was violated by the provision exonerating the accused from liability where he or she proves that the impugned statements were true. Nevertheless, the provision was held to be a reasonable limitation under s. 1 because otherwise the Crown would have had to prove the falsity of the accused's statements beyond a reasonable doubt. This would have excused much of the "harmful expressive activity."

Likewise, in *Chaulk,* a majority held that s. 11(d) was violated by the provision of the *Criminal Code* which raises a presumption of sanity, thereby requiring the accused to prove his insanity on the balance of probabilities in order to raise the insanity defence. A majority held that this provision was a reasonable limitation on s. 11(d) because the alternative - requiring the Crown to disprove insanity - would be an impossibly onerous burden.

In *R.* v. *Ellis-Don Ltd.,* the Ontario Court of Appeal declared unconstitutional the due diligence defence as applied to a provincial regulatory offence. The Court considered a section of the *Occupational Health and Safety Act* requiring a general contractor to ensure that safety measures be followed on a job. Both the statute and the common law provided a defence of due diligence, which required an accused to prove on a balance of probabilities that he had taken all reasonable measures to avoid an accident. The accused's inability to do this required a court to

convict the accused even though it had a reasonable doubt about guilt. The Court held, in its section 1 analysis, that the provision did not violate section 11(d) to the minimum extent possible. This requirement could be satisfied by interpreting the provision to require only that the accused adduce evidence that would raise a reasonable doubt as to whether he had exercised due diligence.

The Courts have also considered the other elements of the s. 11(d) right: the right to a fair hearing and the right to a trial by an independent tribunal.

The Supreme Court of Canada ruled in the *Corbett* case that allowing prior criminal convictions into evidence does not deprive an accused of his right to a fair trial under this section of the Charter. The section of *Evidence Act* which allows this, permits an accused who is testifying on his own behalf to be cross examined with respect to his prior convictions. The rationale is that prior convictions can bear on the witness's credibility.

In the *Vermette* case, the Supreme Court held that statements in the National Assembly by the Premier of Quebec on the accused's case did not necessarily result in the denial of the right to a fair trial due to bias in the jury. Whether this was the case would have to be determined at the time of jury selection, but statements by politicians could not frustrate the whole criminal process.

In *R.* v. *Valente,* the Supreme Court considered the conditions necessary for trial by an independent and impartial tribunal. This involves the tribunal's individual independence (as reflected in security of tenure and financial security) and institutional independence (as reflected in its administrative relationship to the legislative or executive branches of government). The tribunal must not only enjoy these characteristics but must be perceived to do so.

5. Right to Trial by Judge and Jury - Section 11(f)

In the *Lee* case, the Supreme Court of Canada ruled upon the constitutionality of that provision in the Criminal Code that denies a jury trial to an accused who would otherwise be entitled to one where, for no good reason, he fails to attend for trial or fails to remain there once the

trial has begun. The Court, in holding that it was not unconstitutional, said that the Code provision went beyond merely punishing the accused who fails to appear or to remain for his jury trial. The section was enacted for the valid legislative purpose of protecting "the administration of justice from delay, inconvenience, expense and abuse, and to secure the respect of the public for the criminal trial process." As the challenged Code section impairs the right to a jury trial "as little as possible in order to achieve that legislative objective," it is, therefore, "proportionate to the objective of maintaining respect for the system."

6. Right Not to be Tried Twice for the Same Offence - Section 11(h)

In the *Van Rassel* case, the accused was an R.C.M.P. officer and member of an international drug enforcement team. He was arrested in Florida and charged in the U.S. with soliciting and accepting bribes in exchange for information given to him by the American authorities. He was acquitted at trial but was subsequently charged in Canada with breach of trust under the Criminal Code.

The Supreme Court of Canada said that the Charter provision "applies only in circumstances where the two offences with which an accused is charged are the same." Since these two offences related to different activities, they were not the same and it was not objectionable, therefore, for the accused to be prosecuted in Canada after being acquitted in the U.S.

Section 11(h) has a common origin with the long-established defences of "autrefois acquit" and "autrefois convict," "issue estoppel" and the rule enunciated by the Supreme Court in 1975 in the *Kienapple* case. The defences, or pleas, of autrefois acquit and autrefois convict are contained in the Criminal Code. In order for either of them to succeed the accused must show that the current matter and the one of which the accused was previously acquitted or convicted are the same; the new charge must be the same as the charge at the first trial, or be included implicitly in that charge. The charges need not be absolutely identical. All that must be shown is that the accused could have been convicted at the first trial of the charge he is currently facing.

The defence of issue estoppel is based on the principle that a court should not rule on an issue that has already been decided by another court. This principle was recognized by the Supreme Court of Canada in the *Gushue* case.

The rule in the *Kienapple* case provides that a conviction cannot be registered on the second charge if there has been a conviction on a first charge arising out of the same cause. Thus, in a shoplifting case where a person is charged simultaneously with one charge of theft and one of possession of stolen goods, a conviction may only be entered on one or the other where the goods forming the subject of both charges are the same. This is true as well where a person whose breathalyzer reading exceeds the legal limit is charged with both exceeding the legal limit and impaired driving. This principle was most recently reviewed by the Supreme Court of Canada in its decision in the *Prince* case where the Court held that the rule does not apply where there is more than one victim, even if the same facts apply.

F. Cruel and Unusual Treatment or Punishment: Section 12

Section 12 states:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

While this section has not been used to set aside the dangerous offender sections of the *Criminal Code* as unconstitutional, it has provided the courts with an opportunity to review incarceration under this section of the *Criminal Code*. Mr. Justice Allan Linden of the Ontario Supreme Court has held that "indefinitely detaining a menace to society is cruel and unusual punishment and violates the *Charter of Rights and Freedoms*." However, in a case where it was dramatically shown that the accused was dangerous and there was a likelihood that he would cause death or injury to other persons if his behaviour was not restrained, it was concluded that this section of the Charter would not be violated.

In the *Mitchell* case, the Ontario Supreme Court attempted to devise a standard which could be applied when determining whether treatment or punishment was cruel and unusual. The treatment or punishment would

have to be so excessive as to outrage standards of decency and surpass all rational bounds of treatment or punishment. "The test is one of disproportionality: is the treatment or punishment disproportionate to the offence and the offender? Evidence that the treatment or punishment is unusually severe and excessive in the sense of not serving a valid penal purpose more effectively than a less severe treatment or punishment will suffice to satisfy the test of disproportionality."

This test was further subdivided and amplified in the *Soenan* case which dealt with complaints by a prisoner in pre-trial custody. The court here defined the meaning of cruel and unusual *treatment.* It determined that the relevant factors are whether the treatment is in accordance with public standards of decency and propriety; whether it is unnecessary because of the existence of adequate alternatives; and whether or not it can be applied upon a rational basis and in accordance with ascertained or ascertainable standards. Using these tests and applying some new ones (such as "does the treatment have a social purpose and can it be applied upon a rational basis in accordance with ascertainable standards?") the Federal Court Trial Division in the *Belliveau* (No. 2) case held that the mandatory supervision program does not authorize cruel and unusual treatment or punishment.

In the *Smith* case, the Supreme Court of Canada was called upon to decide whether the mandatory seven year minimum sentence for importing narcotics, contrary to s. 5(2) of the *Narcotic Control Act,* breached this section of the Charter. The Court, with one dissenting judgment, held that the section did breach s. 12 and was not justified under s. 1 as a reasonable limit.

It was undisputed that the purpose of the legislation to deter the drug trade and punish importers of drugs, was valid. However, this did not prevent the court from ruling on the validity of the section. Lamer J. (writing also for Dickson, C.J.) discussed the Charter limits on "treatment or punishment".

It is generally accepted in a society such as ours, he stated, that the state has the power to impose a "treatment or punishment"

on an individual where it is necessary to do so to attain some legitimate end and where the requisite procedure has been followed.

The protection in s. 12 governs the quality of punishment, and its effect on the person. The words "cruel and unusual" are to be read together as a "compendious expression of a norm". The criterion to be applied is "whether the punishment prescribed is so excessive as to outrage standards of decency"; the effect of punishment must not be grossly disproportionate to what would have been appropriate. This reasoning is very similar to that found in the *Mitchell* case.

In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from him or her. The other goals which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that in determining a sentence the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender; it means only that the resulting sentence must not be grossly disproportionate to what that offender deserves. If a grossly disproportionate sentence is "prescribed by law," then the purpose which it seeks to attain will fall to be assessed under s. 1. Section 12 ensures that individual offenders receive punishments that are appropriate, or at least not grossly disproportionate, to their particular circumstances, while s. 1 permits this right to be overridden to achieve some important societal objective.

Other cases dealing with the application of this section have concentrated mainly on such matters as solitary confinement and the double-celling of inmates in penitentiaries.

G. Self-Incrimination: Section 13

This section provides that:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

This is similar to s. 5(1) of the *Canada Evidence Act* with one important exception: the *Evidence Act* contemplates that an objection must be made by the witness, whereas the Charter does not. A minor change is that the Charter allows a later prosecution for the giving of contradictory evidence (evidence dissimilar to that previously given) as well as for perjury. This change was necessary because the *Canada Evidence Act* has been interpreted as not encompassing a contradictory evidence charge within the word "perjury."

Section 13, which is obviously linked with s. 11(c), affords protection against testimonial compulsion. Although this protection is better than existed before the Charter came into force, in that the witness need no longer expressly claim protection in order to receive it, there is no absolute right to refuse to answer questions. This was the position of the Supreme Court of Canada in the *Thomson Newspapers Ltd.* case. There, the Court upheld the authority of the Restrictive Trade Practices Commission to examine under oath representatives of corporations suspected of violating the federal *Combines Investigation Act*. Since this was an "inquisitorial" (rather than an "adversarial") proceeding, in which no final determination as to criminal liability is reached, there is not the absolute right to refuse to answer questions. If there was, a "dangerous and unnecessary imbalance between the rights of the individual and the community's legitimate interest in discovering the truth about the existence of practices against which the Act was designed to protect the public" would result. In any case, the individual right to prevent the subsequent use of compelled self-incriminatory testimony continues, unchanged by this requirement; hence, the individual's rights and those of the state are kept in proper balance, said the Court.

An interesting situation developed in the *Dubois* case where it was held by the Alberta Court of Appeal that the testimony of an accused at his own trial may be used by the Crown in an attempt to incriminate him at a new trial ordered by the Court of Appeal after his successful appeal against his conviction. It was determined that the second trial of an accused for the same offence is not an "other proceeding" within the meaning of this section, and therefore his previous testimony can be used against him. The Supreme Court of Canada reversed the decision of the Alberta Court of Appeal in this case and determined that an accused's incriminating testimony given in the initial trial could not be used against him in a subsequent retrial ordered by the Court of Appeal. It was also felt by the court that allowing the prosecution to use the accused's previous testimony would amount to compelling the accused to testify, thus contradicting the rights to remain silent and to be presumed innocent. However, the Supreme Court did not say whether it would rule out the use of previous testimony for the purpose of cross-examination in the re-trial.

This issue has been resolved in two recent decisions. In *R.* v. *Mannion,* the Supreme Court held s. 13 was violated by use of the accused's testimony from a prior trial in cross-examination, in order to contradict the accused's testimony, and thereby establish guilt. However, in the *Kuldip* case, the Supreme Court held that the use of such testimony in cross-examination in order to attack the accused's credibility is not contrary to s. 13; it is not specifically being used to "incriminate" the accused, but only to undermine the truth of the accused's testimony.

SELECTED BIBLIOGRAPHY

Hogg, Peter W. *Canada Act 1982 Annotated.* Carswell, Toronto, 1982.

McDonald, Hon. David C. *Legal Rights in the Canadian Charter of Rights and Freedoms: a Manual of Issues and Sources.* Carswell, Toronto, 1982.

Tarnopolsky, W. and G. Beaudoin. *The Canadian Charter of Rights and Freedoms Commentary.* Carswell, Toronto, 1982.

CASES

Collins v. *The Queen* [1987] 1 S.C.R. 265

Dedman v. *R.* [1985] 2 S.C.R. 673

Dersch v. *Canada* [1990] 2 S.C.R. 1505

Gushue v. *R.* [1980] 1 S.C.R. 798

Hufsky v. *R.* [1988] 1 S.C.R. 621

Kienapple v. *R.* [1975] 1 S.C.R. 729

Langlois and Bedard v. *Cloutier* [1990] 1 S.C.R. 158

Minister of National Revenue v. *Kruger Inc.* (1984), 84 D.T.C. 6478 (Fed. C.A.)

Nelles v. *Ontario* [1989] 2 S.C.R. 170

Operation Dismantle Inc. v. *R.* Can. Charter of Rights Ann. 12-7 (Fed. C.A.) [1985] 1 S.C.R. 441

R. v. *Amos* (1982), 8 W.C.B. 183 (N.W.T. S.C.)

R. v. *Askov* [1990] 2 S.C.R. 1199

R. v. *Baig* [1987] 2 S.C.R. 537

R. v. *Beare* [1988] 2 S.C.R. 387

R. v. *Belliveau* (1984), (No. 2) 12 W.C.B. 191 (F.C. T.D.)

R. v. *Bennett* (1991) 3 O.R. (3d) 193 (Ont. C.A.)

R. v. *Black* [1989] 2 S.C.R. 138

R. v. *Brydges* [1990], 1 S.C.R. 190

R. v. *Cameron* (1984), 16 C.C.C. (3d) 240 (B.C.C.A.)

R. v. *Caron* (1982), 31 C.R. (3d) 255 (Ont. Dist. Ct.)

R. v. *Chambers* [1990] 2 S.C.R. 1293

R. v. *Chapin* (unreported)

R. v. *Chaulk* [1990] S.C.R. 1303

R. v. *Corbett* [1988] 1 S.C.R. 670

R. v. *Crooks* (1982), 8 W.C.B. 107 (Ont. H.C.)

R. v. *Debot* [1989] 2 S.C.R. 1140

R. v. *Duarte* [1990] 1 S.C.R. 30

R. v. *Dubois* (1984), 11 W.C.B. 406 (Alta. C.A.)

R. v. *Dyment* [1988] 2 S.C.R. 417

R. v. *Ellis-Don Ltd.* (1990) 76 D.L.R. (4th) 347 (Ont. C.A.)

R. v. *Evans* [1990] Supreme Court of Canada (as yet unreported)

R. v. *Fraser* (unreported)

R. v. *Gamble* [1988] 2 S.C.R. 595

R. v. *Garofoli* [1990] 2 S.C.R. 1421

R. v. *Greffe* [1990] 1 S.C.R. 755

R. v. *Gustavson* (1982), 1 C.C.C. (3d) 470 (B.C.S.C.)

R. v. *Hébert* [1990] 2.S.C.R. 151

R. v. *Heisler* (1983), 9 W.C.B. 352 (Alta. Prov. Ct.)

R. v. *Higgins* (1988), 61 C.R. (3d) 303 (S.C.C.)

R. v. *Imough* (No. 2) (1982), Can. Charter of Rights Ann. 13-23 (Ont. Prov. Ct.)

R. v. *Ironchild,* Can. Charter of Rights Ann. 15-13 (Sask. Q.B.)

R. v. *Keegstra* [1990] 3 S.C.R. 697

R. v. *Kelly* (1985), Can. Charter of Rights Ann. 15.2-12 (Ont. C.A.)

R. v. *Kokesch* [1990] 3 S.C.R. 3

R. v. *Kuldip* [1990] 3 S.C.R. 618

R. v. *Ladouceur* [1990] 1 S.C.R 1257

R. v. *Lee* [1989] 2.S.C.R. 1384

R. v. *Manninen* [1987] 1 S.C.R. 1233

R. v. *Mannion* [1986] 2 S.C.R. 272

R. v. *Martineau* [1990] 2 S.C.R. 633

R. v. *Nelson* (1982), 3 C.C.C. (3d) 147 (Man. Q.B.)

R. v. *Oakes* [1986] 1 S.C.R. 103

R. v. *Prince* [1986] 2 S.C.R. 480

R. v. *Rao* (1984), 9 D.L.R. (4th) 542 (Ont. C.A.)

R. v. *Roy* (1985), 15 W.C.B. 347 (Ont. H. C.)

R. v. *Ryan* (1982), 2 C.R. 31 (Nfld. Prov. Ct.)

R. v. *Seaboyer; R.* v. *Gayme* [1991] Supreme Court of Canada (as yet unreported)

R. v. *Shea* (1982), 1 C.C.C. (3d) 316 (Ont. H.C.)

R. v. *Simmons* [1988] 2 S.C.R. 495

R. v. *Smith* [1989] 2 S.C.R. 368

R. v. *Stasiuk* (1982), 38 O.R. (2d) 618 (Ont. Prov. Ct.)

R. v. *Storrey* [1990] 1 S.C.R. 241

R. v. *Swain* [1991] Supreme Court of Canada (as yet unreported)

R. v. *Therens* (1985), 18 D.L.R. (4th) 655 (S.C.C.)

R. v. *Thompson* [1990] 2 S.C.R. 1111

R. v. *Vaillancourt* [1987] 2 S.C.R. 636

R. v. *Valente* [1985] 2 S.C.R. 673

R. v. *Van Rassel* [1990] 1 S.C.R. 225

R. v. *Vermette* [1988] 1 S.C.R. 985

R. v. *Whyte* [1988] 2 S.C.R. 3

R. v. *Wiggins* [1990] 1 S.C.R. 62

R. v. *W.K.L.* [1991] Supreme Court of Canada (as yet unreported)

R. v. *Wong* [1990] 3 S.C.R. 36

Re B. C. Motor Vehicle Act [1985] 2 S.C.R. 486

Re Balderstone and R. (1982), 10 W.C.B. 313 (Man. C.A.)

Re Mitchell and R. (1983), 42 O.R. (2d) 481 (H.C.)

Reference Re Manitoba Language Rights [1985] 1 S.C.R. 863

Soenan v. *Thomas* (1983), Can. Charter of Rights Ann. 17-9 (Alta. Q.B.)

Southam Inc. v. *Hunter* [1984] 2 S.C.R. 145

Thomson Newspapers Ltd. v. *Canada (Director of Investigation and Research, Restrictive Trade Practices Commission* [1990] Supreme Court of Canada [1990] 1 S.C.R. 425